

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN NEVIN KLOCK,

Defendant-Appellant.

UNPUBLISHED

October 18, 2007

No. 273406

Mason Circuit Court

LC No. 05-201551-FH

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from a sentence of 45 to 180 months imposed on a conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(a). We affirm.

At the time of his conviction, defendant had a pending charge of manufacturing child sexually abusive material, MCL 750.145c(2). When he appeared for sentencing in this case, he entered a plea of no contest to a reduced charge of attempted possession of child sexually abusive material, MCL 750.92; MCL 750.145c(4), in the other case, and sentencing in both cases was put over for a month.

The guidelines as scored gave defendant 10 points for the prior record variables and 20 points for the offense variables, placing defendant in the C-II category for which the minimum sentence range is 30 to 50 months. MCL 777.63. The court imposed a minimum sentence within that range.

Defendant later sought resentencing on the ground that the 10 points scored for prior record variable 3, MCL 777.53, had been assessed in error and correction of the error would place defendant in the A-II category for which the minimum sentence range is 12 to 20 months. MCL 777.63. The prosecutor agreed that PRV 3 had been improperly scored but argued that PRV 7 had been improperly scored at zero points rather than 10 points because it failed to take into consideration defendant's subsequent conviction in the pornography case. MCL 777.57. Correction of that error would offset the error in the scoring of PRV 3 with the result that the court had in fact utilized the proper minimum sentence range. The court agreed and denied the motion.

The crux of defendant's appeal is that trial counsel was ineffective for either agreeing to adjourn sentencing in this case or for allowing defendant to enter a plea in the pornography case

in that it created an error in the scoring of PRV 7 that offset the error in the scoring of PRV 3 and thus deprived defendant of a lower minimum sentence range.

The trial court is to determine an appropriate sentence within the minimum sentence range obtained under correctly scored sentencing guidelines. *People v Hannan (After Remand)*, 200 Mich App 123, 127; 504 NW2d 189 (1993). “Sentencing issues are reviewed by this Court for an abuse of discretion by the trial court.” *People v Garza*, 246 Mich App 251, 256; 631 NW2d 764 (2001). “An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes.” *People v Havens*, 268 Mich App 15, 18; 706 NW2d 210 (2005). The application of the statutory guidelines is reviewed de novo on appeal. *People v Cook*, 254 Mich App 635, 638; 658 NW2d 184 (2003).

Whether a defendant has been denied effective assistance of counsel is a mixed question of law and fact. The trial court’s factual findings are reviewed for clear error, but this Court determines de novo whether the facts properly found by the trial court establish ineffective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because the trial court did not conduct an evidentiary hearing, this Court’s review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Regardless of the merits of defendant’s claim, he is not entitled to relief for the simple reason that, absent withdrawal of the plea in the pornography case, it is impossible to put this case in the same posture it occupied before defendant entered his plea. Any error by trial counsel affected only defendant’s sentence in this case, and thus the proper remedy would be to grant resentencing. If resentencing were granted, the case would stand in a presentence posture, cf. *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994), and it would be as if defendant were being sentenced for the first time. The prosecutor could challenge the scoring of PRV 7 at resentencing regardless of the fact that she may not have challenged them originally. *People v Lyons (After Remand)*, 222 Mich App 319, 321-322; 564 NW2d 114 (1997). Upon resentencing, PRV 7 would have to be scored at 10 points in light of the fact that defendant had been convicted of the pornography offense after the sentencing offense was committed. MCL 777.57(1)(b), (2)(a). While defendant makes reference to general due process considerations, his due process rights do not permit him or the court to ignore an inconvenient error in the scoring of the guidelines. With the offsetting errors, defendant was sentenced under the appropriate minimum sentence range, and thus the trial court properly denied his motion for resentencing.

Affirmed.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis